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Supreme Court of Minnesota.

CHARLES D. DEAN, *Appellant,*

v.

ST. PAUL UNION DEPOT CO., *Respondent.*

Where a depot company contracts to furnish terminal facilities for the passenger business of a railroad, it is bound to use ordinary care and diligence to keep its premises in a safe condition for passengers; and this obligation renders it liable for knowingly employing, or allowing to be employed in the depot building, a man of vicious temper, of bad character, and who frequently assaults passengers in a wilful and vicious manner.

Appeal from District Court of Ramsay County.

Davis, Kellogg and Severance, for appellant.

John O'Brien, I. V. D. Heard, and Cole, Bramhall and Morris, for respondent.

COLLINS, J., August 5, 1889. The plaintiff appeals from an order sustaining defendant's demurrer to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action. From said complaint, and a stipulation as to certain facts, made by the parties, and by agreement considered as if the facts therein stated had been a part of the pleadings demurred to, it appears that the defendant is a domestic corporation, organized for and engaged in the business of furnishing and conducting an Union Depot and station-house in the city of St. Paul, in which several lines of railway deliver and receive passengers, by virtue of their contracts with defendant; that on May 17th, 1888, plaintiff reached said depot as a passenger upon one of the said roads, and with the intention of pursuing his journey to a point beyond, by another road, entered the station-house, approached the parcel-room therein, leased by defendant to a tenant who operated and controlled it, for the purpose of checking his valise and was there maliciously attacked and beaten by the man in charge, who was in fact the employe of defendant's tenant. The complaint further alleges that this employe was of vicious temper, of bad character, and had frequently, in a wilful and malicious manner, assaulted and beaten people lawfully upon the premises, during the six years he had been employed in said parcel-room, all of which was

known to the defendant on the day of the attack upon plaintiff.

In support of its demurrer, the defendant corporation contends, first, that it owed no duty whatever to the plaintiff, because no contractual relation existed between the parties; that therefore he must look to the railway company, whose passenger he was or had been, for compensation for his injuries; second, if it should be held that the duties imposed by railway companies towards their arriving and departing passengers have been assumed by the defendant, it is not responsible in this case, because the alleged assault was not committed by one of its servants or employes, but by the employe of a tenant who was engaged in an independent business, wholly disconnected from that of a common carrier of passengers, and conducted solely for the accommodation and convenience of those who choose to patronize the room and pay for the privilege of having their parcels temporarily taken care of. Finally, if these positions prove untenable, it is argued that the assault of the employe was for purposes of his own, outside of his occupation, in disregard of the object for which he was employed, not committed in execution of it, and therefore, in no event, can the defendant be held responsible. It has been announced by this Court, in *Ahlbeck v. St. P. M. & M. Ry. Co.* [decided in the Supreme Court of Minnesota, November 20, 1888] that in respect to the handling and care of baggage, the relation between the defendant corporation and the carriers who use its depot, is that of principal and agent. But under the allegations of the complaint now before us, it is not essential to determine the precise relations existing between the defendant (organized for the special purpose and under contract to furnish to certain railway corporations proper and adequate depot and station-house accommodations for those who are entitled to use the same) and the plaintiff, who, arriving upon the train of one of these carriers, remained its passenger until he had an opportunity, by safe and convenient means, to leave the cars, the railway and the station-house: *Warren v. Fitchburg Ry. Co.* (1864), 8 Allen (Mass.) 227.

Nor is it necessary to pass upon the contention of the defendant, that whatever duty it owed the plaintiff as a passenger, it cannot be held liable for the wilful act of the servant and em-

ploye of one who had leased a room in its depot building for the purpose of carrying on an independent business, not required of the carriers of passengers and conducted by a tenant, solely for the convenience of the traveling public. Nor, as we regard the pleadings, need we regard the final position assumed by defendant, that the master is not responsible for the wilful acts of his servant, performed outside of his employment, not in execution of it, and for purposes of his own, although the subject has been referred to in *McCord v. Western U. T. Co.* [decided by the Supreme Court of Minnesota, September 4, 1888], in which is mentioned approvingly, the case of *Stewart v. Ry. Co.* (1882), 90 N. Y. 588, whereby *Isaacs v. Third Avenue Co.* (1871), 47 N. Y. 122—relied upon by the respondent—was, in effect, overruled.

This complaint, considered in connection with the stipulation, charges that the defendant knowingly and advisedly permitted its tenant to keep in his employ, for more than six years, in its depot building, into which it encouraged people to come, and was under contract to admit the plaintiff as an arriving passenger, a man of savage and vicious propensities and who had, during said period of six years, frequently assaulted and beaten persons lawfully upon said premises, and who, upon the day named, attacked and beat the plaintiff without provocation. Whatever obligation otherwise, by virtue of its contract with the carrier, rested upon the defendant as to the plaintiff, it is manifest that it was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there. It had no more right, therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building, a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog, or other animal, or to permit a pitfall, or trap, into which a passenger might step, as he was passing to or from his train.

Order reversed.

The doctrine announced in this case is wholesome and salutary, and it is regretted that the principle upon which it should rest, was not carefully considered and as emphatically announced.

It is contended by the writer that the principle for this doctrine is, that the proprietor, owner or controller of a place open to and for the public, is bound, as a matter of duty, to see that all persons

who come there on the business for which the place is open, are protected from assaults and insults, because, having the privilege of doing such a business and inviting the public to come there, he owes the duty to protect all who come there on that business. This principle was some years ago asserted by the Indiana Court in *Henry v. Dennis* (1883), 93 Ind. 452; and recently by the Supreme Court of Pennsylvania in *Rommel v. Schambacher* (1888), 120 Pa. 582; s. c., 27 AMER. LAW REG. 156. This is nothing more than the announcement of the general doctrine of duty to another invited to a place of business.

It is objected that, if this principle is carried to its legitimate conclusion, it will hold responsible proprietors of stores, and business houses, for assaults and insults committed by strangers who come there with the vicious purpose and intent to do wrong. Is there any reason why they should not be held responsible? If the proprietor had knowledge or notice of the vicious intent, or propensity, or, with reasonable care, could have had such notice, he should be held responsible for his neglect of duty, in not keeping such persons away. If he did not have such notice, and could not have had it by the exercise of reasonable watchfulness and care, there is then a reason for exemption from liability, but, as will hereafter appear, the reason for the principle above stated does not advance this distinction.

The Minnesota Court (*Ahlbeck v. Railroad Co.*, *supra*, p. 23; *McCord v. Western Union Telegraph Co.*, *supra*, p. 24), holds the defendant liable, because he did not keep his premises in safe condition, free from dangerous and vicious men, the same as he must keep it free from dangerous and vicious dogs or other animals, and free from pitfalls or traps.

There are three different doctrines announced in this supposed principle

given as the ground or reason for the ruling in this case: the *first* is the principle which governs the liability resulting from defective and dangerous premises; the *second* is the principle which controls liability for injuries from dangerous and vicious dogs or other animals; and the *third*, those applicable to human beings.

The principles which control the law applicable to the actions of man, are different from those regulating the liability for defective premises, or dangerous and other animals. The principles of the law of liability for defective premises are confined to the unsafe condition, arising from unsafe construction, repair or use, as for instance injuries from pit-falls, the law of which has remained substantially the same since the case of *Blyth v. Topham* (1603), Cro. Jac. 158; Roll Abr. 88; or injuries from spring guns and other instruments of destruction, first discussed in *Deane v. Clayton* (1817), 7 Taunt. 489; and developed in *Ilott v. Wilkes* (1820), 3 Barn. and Ald. 304; *Bird v. Holbrook* (1828), 4 Bing. 628; *Wootton v. Dawkins* (1857), 2 C. B. (N. S.) 413; *Townsend v. Wathen* (1808), 9 East 277; *Hooker v. Miller* (1873), 37 Iowa 613; *Johnson v. Patterson*, (1840), 14 Conn. 1: Or injuries from dangerous places, or dangerous instrumentalities, on private premises or private way, near the highway: *Hargreaves v. Deacon* (1872), 25 Mich. 1; *Kohn v. Lovett* (1871), 44 Ga. 251; *Corby v. Hill* (1858), 4 C. B. (N. S.) 554; *Clark v. Chambers* (1878), 3 Q. B. Div. 327; or injuries from dangerous places in business houses and grounds, as defined in *Carleton v. Franconia Iron Co.* (1868), 99 Mass. 216; and *Indemaur v. Dames* (1866), L. R. 1 C. P. 274; on Appeal (1867), 2 C. P. 311: or dangerous places in public houses, places of public resort, and exhibitions: *Francis v. Cockrell* (1870), L. R. 5 Q.

B. 184; or school buildings: *Donovan v. Board of Education* (1878), 55 How. Pr. (N. Y.) 176; *Bassett v. Fish* (1877), 12 Hun. (N. Y.) 209.

The application of this principle to railroad depots, stations, platforms and approaches, means that these must be free from such defects, as far as reasonable care can make them; and is well expressed by GRAY, J., in *Carleton v. Franconia Iron Co.* (1868), 99 Mass. 216: "The owner, or occupant of premises is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of." So, *McDonald v. Chicago, etc., R. Co.* (1869), 26 Iowa 124; *Toledo, etc., R.R. Co. v. Grush* (1873), 67 Ill. 262; *Liscomb v. N. J., etc., Trans. Co.* (1872), 6 Lans. (N. Y.) 75; *Picard v. Smith* (1861), 10 C. B. (N. S.) 470; *Martin v. Great Northern R. Co.* (1855), 16 C. B. 179; *Clossman v. Long Island, etc., R. Co.* (1877), 9 Hun. (N. Y.) 618. The care demanded is reasonable care only: *Pittsburgh, etc., R. Co. v. Brigham* (1876), 29 Ohio St. 374; *Indiana, etc., R. Co. v. Hudleson* (1859), 13 Ind. 325; *Welfire v. London, etc., R. Co.* (1869), L. R. 4 Q. B. 693; *Chicago, etc., R. Co. v. Wilson* (1872), 63 Ill. 167; *Cornman v. Eastern Counties R. Co.* (1859), 4 Hurl. & Nor. 781; *Cross v. L. S. & M. S. R. R. Co.* (1888), 27 AMER. LAW REG. 405.

The liability for injuries by vicious and dangerous dogs, or other animals, rests on different principles; see a lengthy annotation to *Worthen v. Love*, 27 AMER. LAW REG. 631. At common law, the owner of a dog was not liable for its vicious acts, unless he had

knowledge of the vicious propensities and failed to exercise the proper care in restraint, because a dog was considered tame and harmless, and hence to charge the owner or keeper, *scienter* must be alleged and proved: *Read v. Edwards* (1864), 17 C. B. (N. S.) 245; *Dearth v. Baker* (1867), 22 Wis. 73; *Slinger v. Henneman* (1875), 38 Id. 504; *Fairchild v. Bentley* (1858), 30 Barb. (N.Y.) 147. This is the rule as to all animals *domite naturae*, unless changed by State statute, but with respect to wild animals, the owner, or keeper, was held an *insurer* against all injuries, though the late cases seem to place the liability upon the degree of care used, holding the keeper, or owner, to that high degree of care which a knowledge of the vicious propensities seems to demand: *Cooley on Torts* 349. In both cases, the *scienter* must be alleged and proved, because, knowing the vicious and dangerous propensities, it is his duty to adopt such measures, and use such precaution and restraint as will prevent injury from such propensities: *May v. Burdett* (1846), 9 Q. B. 101; *Earl v. Van Alstine* (1850), 8 Barb. (N. Y.) 630; *Van Leuven v. Lyke* (1848), 1 N. Y. 515; *Loomis v. Terry* (1837), 17 Wend. (N. Y.) 496.

A careful and exhaustive research has failed to discover any authority, where this doctrine has been applied to human beings, because the purposes, causes, and reasons, for the birth and existence of the doctrine are not applicable to man, and it is believed that no court, and no writer, has heretofore asserted such an application. Among the many reasons for the non-applicability of this doctrine to the acts of man, discoverable by a study of the cases, is the primitive one, that with all law and at all times, man has been recognized as a rational being, not possessing and incapable of exercising the propensities of the dog, or other animal, but pos-

sessed of the faculties of a rational and responsible actor and punishable as such, for any criminal transgression; that being the only way, known to all law, to regulate the action of man, except when devoid of this rational element, in which case he would be placed *custodia legis*.

Upon the ground of public policy, and as an essential in the regulation and protection of diversified rights in communities, this elementary law (that the only remedy for a crime, is the punishment, civilly and criminally, of the person who commits it) has been modified, or changed, with respect to innkeepers, carriers of passengers, assaults, etc., committed by servants, while acting within the line of their duty, and now by the Pennsylvania (*Rommel v. Schambacher* (1887), 126 Pa. 582; s. c., 27 AMER. LAW REG. 156) and Minnesota courts (in *Ahlbeck v. St. Paul, P. M. & M. Co.*, and *McCord v. Western Union Tel. Co.*, *supra*, pp. 23, 24), to places open to and for the entertainment of the public. In these cases, the principal is held responsible for the assaults, or insults, which he did not commit. He is punished *civiliter*, for a crime which another committed, because public policy exacts the duty of protection in such cases, and holds him, who is required to exercise that duty, liable for any failure or neglect.

Within the law governing the liability of innkeepers, may be found the whole and true principle for holding one man civilly responsible for a crime committed by another, and the application of this doctrine to the other classes, is not the advancement of a new principle in the law. There is no difference between the reasons which hold the innkeeper responsible, and those for holding a master liable for the assaults of his servant, while doing the business with which he was entrusted, and holding a railroad liable for assaults by

its employees. It is settled that a carrier is liable for an assault upon a passenger, whether committed by an employe or a stranger. Some jurisdictions place the liability on the ground of contract, and others on the ground of duty, while the minority of the cases exclude all liability for assault, unless committed by the servant within the scope of his duty, but do not define what is or what is not within the line of the servant's duty. Prominent in following this judicial jugglery is the Supreme Court of Ohio in (*Witmore v. L. M. R. R. Co.* (1869), 19 Ohio St. 110) holding the carrier not liable where the baggage checker struck the passenger with a hatchet whilst in the act of checking his baggage, on the ground that the servant was hired to check baggage and not to use the hatchet or assault passengers, hence he was acting outside the scope of his duty. Whether the principle for the liability is that of contract or duty, the weight of the decisions hold the carrier bound to protect the passenger during the ingress to the carriage, and the exit. The principle for the protection during the carriage *in the conveyance* of the carrier, is plain, no matter whether it rests on contract or duty, because it is only a distinction of terms, and not of substance, to say, that as matter of law, the passenger contracted for safe transportation (as most clearly announced in *Chamberlain v. Chandler* (1823), U. S. C. Ct. Dist. Mass., 3 Mason 242), or that the law imposes the duty of safe transportation.

For an assault committed on a passenger during the time he is being carried in the conveyance, the weight of the authority is that the *liability rests on contract*; namely, that the passenger contracted for safe transportation, and an assault is a breach of that contract; or, in other words, the law imposes the duty of safe transportation

by virtue of the contract, whether the breach is committed by a stranger, or by a servant, without respect to the question whether the servant was or was not acting within the scope of his duty: *Chamberlain v. Chandler*, *supra*, p. 27; *Nieto v. Clark* (1858), U. S. C. Ct., Dist. Mass., 1 Cliff. 145; *Goddard v. Grand Trunk R. R.* (1869), 57 Me. 202; *Craker v. Chicago, etc., Ry.* (1875), 36 Wis. 657; *Chicago, etc., R. R. v. Flexman* (1882), 103 Ill. 546; *Farkit Co. v. True* (1878), 88 Id. 608; *Sherley v. Billings* (1871), 8 Bush. (Ky.) 147; *McKinley v. R. R.* (1876), 44 Iowa 314; *New Orleans R. R. v. Burke* (1876), 53 Miss. 200; *Bryant v. Rich* (1870), 106 Mass. 180; *Landreau v. Bell* (1833), 5 La. (O. S.) 434; *Flint v. Trans. Co.* (1868), 34 Conn. 554; *Pittsburgh, etc., R. R. v. Hinds* (1866), 53 Pa. 512; *Phila. & Reading R. R. v. Derby* (1852), 14 How. (55 U. S.) 468; *Seymour v. Greenwood* (1861), 7 Hurl., Nor. 354; *Moore v. Fitchburg, etc., R. R.* (1855), 4 Gray (Mass.) 465; *Weed v. Panama R. Co.* (1858), 17 N. Y. 362; *Milwaukee, etc., R. v. Finney* (1860), 10 Wis. 388; *Quigley v. Central Pac. R. Co.* (1876) 11 Nev. 350; *Malecek v. Tower Grove R. R. Co.* (1874), 57 Mo. 18; *Hanson v. European, etc., R. R. Co.* (1873) 62 Me. 84; *Pendleton v. Kinsley* (1871), U. S. C. Ct., Dist. R. I., 3 Cliff. 416; *Rounds v. Delaware, etc., R. Co.* (1876), 64 N. Y. 129; *Shea v. Sixth Ave. R. Co.* (1875), 62 Id. 180; *Cohen v. Dry Dock Co.* (1877), 69 Id. 170; *Stewart v. Brooklyn, etc., R. R.* (1882), 90 Id. 588; *Ransden v. Boston & Alb. R. R.* (1870), 104 Mass. 117; *Terre Haute and Indianapolis R. R. Co. v. Jackson* (1882), 81 Ind. 19; *Wabash and St. Louis R. R. v. Rector* (1882), 104 Ill. 296; *Lynch v. Met. Elevated R. R.* (1882), 90 N. Y. 77; *Louisville, etc., R. R. v. Kelly* (1883), 92 Ind. 371; *International, etc., R. R. v. Kentle*

(1883), 2 Tex. Ct. App. 262; *Bryan v. Chicago, etc., R. R.* (1884) 63 Iowa 464. This liability is confined to the period during which the passenger was being carried in the carrier's conveyance; as where, during the carriage, the brakeman struck the plaintiff because he intimated that the brakeman stole his watch: *Chicago, etc., R. R. v. Flexman* (1882), 103 Ill. 546; where the clerk assaulted the passenger: *Sherley v. Bellings* (1871), 8 Bush. (Ky.) 147; where the conductor kissed a lady passenger: *Craker v. Chicago, etc., Ry. Co.* (1875), 36 Wis. 657; where the driver of the street car assaulted and beat the plaintiff: *Stewart v. Brooklyn, etc., R. R.* (1882), 90 N. Y. 588.

The other line of decisions exclude the theory of contract or duty arising out of contract, and place the liability on the ground of the servant acting within the scope of his employment; the rule being, if the servant committed the assault, or tortious act, within the line of his employment, the master was held liable, and if he did not so commit it, the master was not liable. The difficulty was in determining what was, and what was not, within the servant's line of duty, and this has been the trouble since the case of *Mac manus v. Cricket* (1800), 1 East 103, which introduced the rule. The jurisdictions which hold the carrier liable, on the ground of contract, or duty, must necessarily reject this rule, and it is not applicable to innkeepers, nor, in Pennsylvania (*Rommel v. Schambacher* (1887), 126 Pa., 582; s. c. 27 AM. R. LAW REG. 156) to saloons or places open to the public, and, by the decision in the principal case, not applicable to depot companies. Where the doctrine prevails, the decisions attempted to define the rule, some stating the test to be the answer to the question "Was the servant acting for his own purpose, or

the purposes, or behalf of the company?"—and others that "If the servant has the power to do the act, the master is responsible for the manner in which it was done,"—as, for instance, having the power to eject a passenger from the car, the carrier was held responsible, if the ejection was improper and unlawful: *Indianapolis, etc. R.R.v. Anthony* (1873), 43 Ind. 183; as ejection on a false charge, on improper grounds and abuse of the power: *Ramsden v. Boston & Alb. R. R.* (1870), 104 Mass. 117; *Higgins v. Watervliet, etc., R. R.* (1871), 46 N. Y. 23; *Passenger R. R. v. Young* (1871), 21 Ohio St. 518; *Redding v. South Carolina R. R.* (1871), 3 S. C. 1; *Schultze v. Third Ave.* (1880), 46 N. Y. Super. Ct. 211. On the other hand, the carrier was held not liable for the assault upon a passenger, by a brakeman: *Evansville R. R. v. Baum* (1866), 26 Ind. 70; nor for the driver of the car knocking a small boy from the platform: *Pittsburg, etc., R. R. v. Donahue* (1871), 70 Pa. 119; because in the former case the brakeman was not pursuing his duties as a brakeman when he committed the assault, that is, he did not assault the passenger while in the act of turning or regulating the brakes; and in the latter case, because the driver's line of duty was to drive and not to put any one off the car.

In the jurisdictions which hold the carrier liable on the ground of contract, or duty, arising from contract, the identical facts in *Evansville R. R. v. Baum* (1866), 26 Ind. 70, and *Pittsburg, etc., R. R. v. Donahue* (1871), 70 Pa. 119, were sufficient to hold the carrier liable: *Chicago, etc., R. R. v. Flexman* (1882), 103 Ill. 546. The reason of the conflict is that two different principles have been invoked, one following the doctrine of duty, and the other *respondeat superior*; one, that it is a duty, which the law imposes and the principal cannot shirk, and

is therefore liable, whether he performs the duty personally, or delegates it to another; and the other depends upon the fact, whether the servant acted within the scope of his employment.

If it could be generally affirmed that a master is liable for the acts of his servant, tortious or contractual, while doing the business with which he is entrusted there would not occur so much trouble. The servant, *quoad* the business, is the master during the transaction of that business, as, for instance, the brakeman of the train represents the master during the whole trip, and whether he acts as brakeman, conductor, porter or car sweeper, the passenger and third persons have the right to hold the principal, present and acting in the person of the brakeman, and doing in all respects that which the principal would do if present. It is very narrow judgment to split such business up into as many divisions as the servant wishes, making one part the acts of the master, and the other part only binding on the servant; as, for instance, where the conductor stopped the train and took up the plaintiff's child: *Gilliam v. South, etc., R. R.* (1881), 70 Ala. 268; or set fire to the child: *Cooley* 68; it was held that the master was not liable. It was the servant's act, outside of the line of his duty to his master.

The distinction is too small. The master put into the hands of the servant the means by which the wrong was committed. He hired the wrong servant. If the master had been in charge of the train, or if he had hired a careful and proper servant, the train would not have stopped and the assault would not have been committed, nor the child fired. Hence, because he failed in his duty, by hiring the wrong servant, the master is exempt from liability for the wrongs his servant commits.

The objection is not directed to the substance of the doctrine, but to the

statement of it. If properly defined and properly applied, it is believed to be in perfect accord with the doctrine of duty. Take the case which first laid down the rule: *Macmanus v. Cricket* (1800), 1 East 103, and ask the question, which is the more sensible, to say that having put the servant in charge of a vehicle to drive to a certain place, the master *is liable* for all the acts of the servant while so driving the vehicle, because he is put there by the master to perform a duty which the master was bound to do; namely, to drive the vehicle and conduct himself so as not to do injury to another; or to say that the master *is not liable*, because the servant, instead of going on the direct road to do the business with which he was entrusted, went in a roundabout way and committed the wrong complained of. In the former case, the master is liable, because it was *his duty* to so use his property as not to injure another, whether he drove the vehicle himself, or entrusted the driving to his servant; and in the latter case, the question of route is the criterion.

Holding a master responsible for the willful wrong of the servant, is an infringement of the natural and primitive rule that man, being rational, is individually responsible for his own wrongs, and that one man should not suffer for the wrongs and sins of another. The term wrong, means willful, such as assaults and not negligence, or injuries resulting from want of care. This infringement was made for public policy, in the law of innkeepers, and applied to the doctrine of *respondeat superior*, and the other branches above mentioned, but, because the principle for the infringement is nowhere advanced, and nowhere affirmed, the decisions have oscillated to and fro. That the principle above contended for, is the true and proper one, is supported by the reasoning and discussions of the following

cases: *Phila. & Reading R. R. v. Derby* (1852), 14 How. (55 U. S.) 468; *Philadelphia, etc., R. R. v. Quigley* (1858), 21 How. (62 U. S.) 202; *Moore v. Fitchburg, etc., R. R.* (1855), 4 Gray. Mass. 465; *Pennsylvania, etc., R. R. v. VanDever* (1862), 42 Pa. 365; *Pittsburg, etc., R. R. v. Slusser* (1869), 19 Ohio St. 157; *Atlantic, etc., R. R. v. Dunn* (1869), Id. 162; *Dalton v. Beers* (1871), 38 Conn. 529; *Hopkins v. Atlantic, etc., R. R.* (1857), 36 N. H. 9; *Baltimore, etc., R. R. v. Blocher* (1867), 27 Md. 277; *Hanson v. European R. R.* (1873), 62 Me. 84; *New Orleans, etc., R. R. v. Hurst* (1859), 36 Miss. 660; *Sherley v. Billings* (1871), 8 Bush. (Ky.) 147; *Malecek v. Tower Grove R. R.* (1874), 27 Mo. 18; *Goddard v. Grand Trunk Ry.* (1869), 57 Me. 202, *Brand v. Schenectady, etc., R. R.* (1850), 8 Barb., N. Y., 368; *Seymour v. Greenwood* (1861), 7 Hurl. & Nor. 354; *Milwaukee R. R. v. Finney* (1860), 10 Wis. 388; *Pittsburg, etc., R. R. v. Hinds* (1866), 53 Pa. 512; *Weed v. Panama R. R.* (1858), 17 N. Y. 362; *Flint v. Transportation Co.* (1868), 34 Conn. 362; *Landreau v. Bell* (1833), 5 La. (O. S.) 434; *Chamberlain v. Chandler* (1823), U. S. C. Ct., Dist. Mass., 3 Mason 242; *Nieto v. Clark* (1858), U. S. C. Ct., Dist. Mass., 1 Cliff. 145.

About the best discussion is found in *Goddard v. Grand Trunk Ry.* (1869), 57 Me. 202; and the conclusion reached was that it was the *duty* of the carrier to protect the passenger against violence and insults of strangers, co-passengers and servants, and—"If this duty is not performed and this protection not furnished, but on the contrary, the passenger is assaulted and insulted * * by the carrier's servant, the carrier is responsible." The same conclusion is reached in *Rounds v. Delaware, etc., R. R.* (1876), 64 N. Y. 137, though the reasoning is laborious and not close; the

Court stated that the master who puts the servant in a place to do the master's business, is responsible for what the servant does through lack of judgment, or discretion, or from infirmity of temper, or under the influence of passion, beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. This reasoning was followed in *Cohen v. Dry Dock Co.* (1877), 60 N. Y. 170. The same line of argument was advanced in *Craker v. Chicago R. R.* (1875), 36 Wis. 657; and in the cases there cited, where the Court said that it would be cheap and superficial morality to allow one owing a duty to another, to commit the performance of this duty to a third person, and be exempt from responsibility for the malicious conduct of the substitute.

The reasoning in *Craker v. Chicago etc., R.R.* (1875), 36 Wis. 657; is well enforced by the case cited in the opinion. The same reasoning and doctrine were advanced in *Stewart v. Brooklyn, etc., R. R.* (1882), 90 N. Y. 588; which re-

pudiates some earlier cases, among them *Isaac v. The Third Avenue R. R.* (1871), 47 N. Y. 122, and which follows *Goddard v. Grand Trunk R. R.* (1869), 57 Me. 202, and *Craker v. Chicago, etc., R. R.* (1875), 36 Wis. 657; and the line of cases advanced to support the doctrine stated by the writer. The argument advanced in *Isaacs v. The Third Avenue R. R.* (1871), 47 N. Y. 122, is the same as that found in *Parker v. Erie, etc., R. R.* (1875), 5 Hun. (N. Y.) 57; *Little M. R. R. v. Wetmore* (1869), 19 Ohio St. 110; *Ward v. Omnibus Co.* (1873), 42 L. J. C. P. 265; *Evansville v. Baum* (1866), 26 Ind. 70; *Great Western R. R. v. Miller* (1869), 19 Mich. 305; *Priest v. Hudson River R. R.* (1871), 40 How. Pr. (N. Y.) 456; *Johnson v. Chicago, etc., R. R.* (1882), 58 Iowa 348; and has not that weight of reason and logic in support which are contained in the other cases.

JNO. F. KELLY.

St. Paul, Minn.

Supreme Court of Texas.

INSURANCE CO. OF NORTH AMERICA

V.

EASTON ET AL.

A warranty in a policy of fire insurance, that "this insurance shall not insure to the benefit of any carrier," does not contravene public policy, nor is it in restraint of trade.

Although a stipulation in a bill of lading, which gives the carrier the benefit of any insurance upon the goods carried, is valid, and, in case of loss, will defeat the insurer's right of subrogation, the insured, by entering into such a contract, forfeits all rights under a policy containing a warranty that the insurance shall not insure to the benefit of any carrier, nor can a carrier acquire any rights under such a policy.

It is immaterial, in such case, that the contract of insurance was made without the carrier's knowledge or privity.

Appeal from District Court, Galveston County.